Allianz General Insurance Malaysia Bhd v Navis Shim Lee Hiong

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–52 OF 2002–I
CLEMENT SKINNER J
31 OCTOBER 2003

Civil Procedure — Summary judgment — Triable issues — Assessment of market value of motor vehicle at time of its loss — Whether a triable issue

Insurance Law — Motor insurance — Construction of policy — Policy of insurance — Whether policy a valued or unvalued policy — Amount specified as sum insured — Whether amount was fully recoverable or merely maximum amount recoverable

The plaintiff's claim was on a policy of insurance against loss, damage or liability ('the said policy') issued to the plaintiff by the defendant. The property insured was a motor-vehicle ('the said vehicle'). The policy was renewed four times. When the plaintiff first proposed to insure the said vehicle with the defendant, the sum for which it was to be insured was stated in the proposal form as: 'Sum Insured (market value) RM120,000'. In each of the cover notes which were issued prior to the renewal of the policy on each of the four occasions, the schedule stated 'Sum Insured (market value) RM120,000'. However, the cover notes expressly provided that the risk was covered in the terms of the company's (defendant's) usual form of policy applicable thereto. Clause 2(b) of Section A of the policy stated, inter alia, that in the event of loss, the defendant would pay the market value of the vehicle at the time of the loss or the sum insured in the policy whichever was the lower figure. The plaintiff's vehicle was stolen just before the expiry of the policy and the plaintiff claimed on the said policy. The plaintiff demanded the sum of RM120,000 as the sum insured but the defendant offered a lesser sum, initially offering RM88,800 and then increasing the offer to RM93,000. After rejecting both offers the plaintiff commenced this action and then applied for summary judgment before a defence could be filed by the defendant. The learned sessions court judge allowed the plaintiff's application for summary judgment in the sum of RMl18,800 after deducting RMl,200 for excess under the policy. The appellant (defendant) appealed against the decision of the sessions court in allowing the respondent's (plaintiff's) application for summary judgment. The defendant contended that the policy was an unvalued policy and that the RM120,000 which was stated in the relevant cover note and said policy as the 'Sum Insured (market value)' was only the estimated value of the said vehicle and not its market value. According to the defendant, even though an amount was specified in the policy as the sum insured, on a true construction of the terms of the said policy, the plaintiff was only entitled to be paid the market value of the vehicle at the time of loss. The defendant further contended that what the market value of the vehicle was at the time of its loss was a question of fact which was seriously in dispute and which was a triable issue. The plaintiff however contended, that once the defendant had accepted the plaintiff's proposal to insure the said vehicle for RM120,000 and having stated in the

cover note and policy that the 'Sum Insured (market value)' was RM120,000, she (the plaintiff) became entitled, contractually, to be paid the full insured sum of RM 120,000 (less RM 1,200 for excess) which the defendant had accepted as the value of the said car. The plaintiff further contended that as the defendant had stated in the cover note which it issued on 13 September 2001 (in respect of the fourth renewal of the policy) that the 'Sum Insured (market value)' was RM120,000 and the said vehicle was stolen the next day, that was the conclusive value of the said vehicle at the time of loss. The plaintiff also argued that having been stolen, the said vehicle was not physically available for valuation purposes and therefore it would be futile to attempt to estimate the market value of the said vehicle in accordance with the terms the said policy. Thus, the evidence of market value that was offered by the defendant should be rejected, and the plaintiff entitled to have any ambiguity that may have arisen between the cover note and said policy resolved in favour of the plaintiff by applying the contra proferentum rule.

Held, allowing the appeal with costs, setting aside the summary judgment entered against the defendant and giving leave to the defendant to defend the action on the issue of market value of the said vehicle at the time of its loss:

(1) The appeal turned on whether the said policy was a valued or unvalued policy. Whether the said policy was a valued or unvalued policy was a question of construction of the relevant terms of the said policy. The question was whether by specifying in the said policy that RM120,000 was the 'Sum Insured (market value)', the value of the said vehicle had become fixed by agreement and inserted in the said policy as the amount recoverable in the event of loss. If so the policy was a valued policy and the plaintiff was entitled to recover the RM120,000 on proof of the loss (see paras 14–18).

(2) In the instant case, the policy was not a valued policy. The fact that an amount had been specified as the sum insured with the words 'market value' in brackets in the relevant cover note and the said policy did not, without more, establish that the said policy was a valued policy because the cover note incorporated the terms and conditions of the defendant's usual form of policy. Thus, both documents had to be read together. A reading of the said policy as a whole showed that the sum to be paid to the plaintiff was not fixed by the policy but left to be ascertained after the loss had happened. It was therefore reasonable to conclude that the said policy was an unvalued policy and that the sum of RM120,000 stated in the cover note and policy was the maximum sum recoverable in accordance with the terms of the said policy, but only if it was less than the market value of the said vehicle at the time of loss (see para 19–22); *Chop Eng Thye Co v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 161 followed.

(3) The High Court could not agree with the plaintiff's contention that because the said vehicle was stolen one day after the defendant had issued the cover note of 13 September 2001 in which the 'Sum Insured (market value)' was stated as being RM120,000, that estimate was the

conclusive value of the said vehicle at the time of loss. This was for the simple reason that the cover note incorporated the terms and conditions of the defendant's usual form of policy (see para 23).

(4) The High Court could not also agree with the plaintiff's contra proferentum rule arguments. Whilst the absence of the said vehicle would make it more difficult to assess its market value at the date of its loss, this did not mean that an ambiguity had arisen in the said policy. The difficulty in valuation had arisen as a result of the non-availability of the said vehicle and not because of any ambiguity in the terms and conditions found in the said policy. Notwithstanding the absence of the said vehicle, the said policy did set out how market value was to be assessed. It would be up to the assessing court to decide, after evaluating the evidence on market value presented to it by the parties, what that value ought to be. The issue of the market value of the said vehicle at the time of loss was very much a triable issue (seeparas 24–26); *Supreme QBE Insurance Berhad v Foo Yin Toh* [1987] CLJ (Rep) 993 distinguished.

[**Bahasa Malaysia summary**

Tuntutan plaintif adalah berdasarkan satu polisi insuran terhadap kerugian, kerosakan atau liabiliti ('polisi tersebut') yang dikeluarkan kepada plaintif oleh defendan. Harta yang diinsurankan adalah sebuah kenderaan bermotor ('kenderaan tersebut'). Polisi tersebut telah diperbaharui empat kali. Apabila plaintif pertama kali bercadang untuk menginsurankan kenderaan tersebut dengan defendan, jumlah ia akan diinsurankan telah dinyatakan dalam borang cadangan sebagai: 'Jumlah Diinsurankan (nilai pasaran) RM120,000'. Dalam setiap nota perlindunganyang dikeluarkan sebelum pembaharuan polisi tersebut untuk setiap empat kejadian, jadual menyatakan 'Jumlah Diinsurankan (nilai pasaran) RM120,000'. Namun begitu, nota perlindungan dengan nyata memperuntukkan bahawa risiko dilindungi dalam terma-terma borang polisi biasa syarikat (defendan) yang digunakan. Klausa 2(b) kepada Seksyen A polisi tersebut menyatakan, antara lain, bahawa sekiranya berlaku kehilangan, defendan hendaklah membayar nilai pasaran kenderaan tersebut pada masa kehilangan atau jumlah yang diinsurankan dalam polisi tersebut yang mana lebih rendah. Kenderaan plaintif telah dicuri sejurus sebelum polisi tersebut luput dan plaintif telah menuntut berdasarkan polisi tersebut. Plaintif menuntut jumlah RM120,000 sebagai jumlah diinsurankan tetapi defendan telah menawarkan jumlah yang lebih rendah, pada mulanya menawar RM88,800 dan kemudian meninggikan tawaran kepada RM93,000. Selepas menolak kedua-dua tawaran plaintif telah memulakan tindakan ini dan kemudian memohon untuk penghakiman terus sebelum satu pembelaan dapat difailkan oleh defendan. Hakim mahkamah sesyen yang bijaksana membenarkan permohonan plaintif untuk penghakiman terus untuk jumlah RMl18,800 selepas menolak RMl,200 for excess under the policy. Perayu (defendan) telah merayu terhadap keputusan mahkamah sesyen yang membenarkan permohonan responden (plaintif) untuk penghakiman terus. Defendan berhujah bahawa polisi tersebut adalah satu polisi tanpa nilai dan

bahawa RM120,000 dinyatakan dalam nota perlindungan yang berkaitan dan polisi tersebut sebagai 'Jumlah Diinsurankan (nilai pasaran)' hanya nilai anggaran kenderaan tersebut dan bukan nilai pasarannya. Menurut defendan, walaupun satu jumlah telah ditetapkan dalam polisi tersebut sebagai jumlah diinsurankan, berdasarkan pembentukan sebenar terma-terma polisi tersebut, plaintif hanya berhak untuk dibayar nilai pasaran kenderaan tersebut pada masa kehilangan. Defendan selanjutnya berhujah bahawa apakah nilai pasaran kenderaan tersebut pada masa kehilangan adalah satu persoalan fakta yang dipertikaikan secara serius dan adalah satu persoalan yang perlu dibicarakan. Plaintif bagaimanapun berhujah, bahawa sekiranya defendan menerima cadangan plaintif untuk menginsurankan kenderaan tersebut untuk RM120,000 dan setelah menyatakan dalam nota perlindungan dan polisi tersebut bahawa 'Jumlah Diinsurankan (nilai pasaran)' adalah RM120,000, beliau (plaintif) akan berhak, secara kontrak, dibayar penuh jumlah diinsurankan RM120,000 (kurang RM1,200 jika lebih) yang defendan terima sebagai nilai kenderaan tersebut. Plaintif seterusnya berhujah bahawa oleh kerana defendan telah menyatakan dalam nota perlindungan yang ia telah keluarkan pada 13 September 2001 (berhubung pembaharuan keempat polisi tersebut) bahawa 'Jumlah Diinsurankan (nilai pasaran)' adalah RM120,000 dan kenderaan tersebut telah dicuri keesokan harinya, ia adalah nilai yang tidak boleh dipertikaikan kenderaan tersebut pada masa kehilangannya. Plaintif juga berhujah bahawa oleh kerana dicuri, kenderaan tersebut tiada secara fisikal bagi tujuan penilaian dan oleh itu tidak berguna untuk cuba menaksirkan nilai pasaran kenderaan tersebut menurut terma-terma polisi tersebut. Oleh itu, keterangan nilai pasaran yang ditawarkan oleh defendan hendaklah ditolak, dan plaintif berhak kepada ketaksaan yang mungkin timbul antara nota perlindungan dan polisi tersebut diselesaikan menyebelahi plaintif dengan memakai rukun kontra proferentum.

Diputuskan, membenarkan rayuan dengan kos, mengenepikan penghakiman terus yang dimasuki terhadap defendan dan memberikan kebenaran kepada defendan untuk membuat membela tindakan tersebut berhubung persoalan nilai pasaran kenderaan tersebut pada masa kehilangannya:

(1) Rayuan tersebut adalah berhubung sama ada polisi tersebut adalah satu polisi bernilai atau tidak. Sama ada polisi tersebut adalah satu polisi bernilai atau tidak adalah satu persoalan pembentukan terma-terma relevan dalam polisi tersebut. Persoalannya adalah sama ada dengan menspesifikasikan dalam polisi tersebut bahawa RM120,000 adalah 'Jumlah Diinsurankan (nilai pasaran)', nilai kenderaan tersebut adalah tetap melalui perjanjian dan dimasukkan dalam polisi tersebut sebagai jumlah yang boleh dituntut sekiranya berlaku kerugian. Jika begitu polisi tersebut adalah satu polisi bernilai dan plaintif berhak untuk menuntut RM120,000 atas bukti kehilangan tersebut (lihat perengganperenggan 14–18).

(2) Dalam kes semasa, polisi tersebut bukan satu polisi bernilai. Hakikat bahawa satu jumlah telah ditetapkan sebagai jumlah diinsurankan dengan perkataan-perkataan 'nilai pasaran' dalam kurungan dalam nota perlindungan dan polisi tersebut tidak, dan tidak lebih, membuktikan

bahawa polisi tersebut adalah satu polisi bernilai kerana nota perlindungan yang membentuk terma-terma dan syarat-syarat borang polisi biasa defendan. Oleh itu, kedua-dua dokumen hendaklah dibaca bersama. Polisi tersebut jika dibaca secara keseluruhan menunjukkan bahawa jumlah yang perlu dibayar kepada plaintif tidak ditetapkan oleh polisi tersebut tetapi akan ditentukan selepas kehilangan berlaku. Oleh itu adalah munasabah untuk membuat kesimpulan bahawa polisi tersebut adalah satu polisi tanpa nilai dan bahawa jumlah RM120,000 yang dinayatakan dalam nota perlindungan dan polisi adalah jumlah maksima yang boleh dituntut menurut terma-terma polisi tersebut, tetapi hanya jika ia lebih kurang daripada nilai pasaran kenderaan tersebut pada masa kehilangan (lihat perenggan-perenggan 19–22); *Chop Eng Thye Co v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 161 diikut.

(3) Mahkamah Tinggi tidak bersetuju dengan hujah plaintif bahawa kerana kenderaan tersebut telah dicuri satu hari selepas defendan mengeluarkan nota perlindungan bertarikh 13 September 2001 yang mana 'Jumlah Diinsurankan (nilai pasaran)' dinyatakan sebagai RM120,000, anggaran tersebut adalah nilai yang tidak dapat dipertikaian kenderaan tersebut pada masa kehilangan. Ini adalah untuk sebab yang mudah bahawa nota perlindungan tersebut membentuk terma-terma dan syarat-syarat borang polisi biasa defendan (lihat perenggan 23).

(4) Mahkamah Tinggi juga tidak bersetuju dengan hujah-hujah rukun contra proferentum plaintif. Meskipun dengan ketiadaan kenderaan tersebut akan menjadikan sukar untuk menaksir nilai pasarannya pada tarikh kehilangannya, ini tidak bermaksud satu ketaksaan timbul dalam polisi tersebut. Kesukaran dalam penaksiran telah timbul akibat daripada ketiadaan kenderaan tersebut dan bukankerana apa-apa ketaksaan dalam terma-terma dan syarat-syarat yang didapati dalam polisi tersebut. Meskipun ketiadaan kenderaan tersebut, polisi tersebut telah menyatakan bagaimana nilai pasaran patut ditaksirkan. Ia terpulang kepada mahkamah yang menaksir untuk memutuskan, selepas meneliti keterangan pada nilai pasaran yang dikemukakan oleh pihak-pihak, apakah nilai sepatutnya. Persoalan nilai pasaran kenderaan tersebut pada masa kehilangan sememangnya satu persoalan yang perlu dibicarakan (lihat perenggan-perengggan 24–26); *Supreme QBE Insurance Berhad v Foo Yin Toh* [1987] CLJ (Rep) 993 dibeza.]

Notes

For cases on the construction of insurance policies, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 278–280.

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

Cases referred to

Chop Eng Thye Co v Malaysia National Insurance Sdn Bhd [1977] 1 MLJ 161 (folld)

Supreme QBE Insurance Berhad v Foo Yin Toh [1987] CLJ (Rep) 993 (distd)

Appeal from: Summons No 53–99 of 2002–III (High Court, Kuching)

Frank Tang (Tang & Partners) for the appellant.
Chew Pok Oi (Chew Jugah Wan Ullok & Co) for the respondent.

Clement Skinner J:

[1] This is an appeal from the decision of the learned sessions court judge given on 27 November 2002 allowing the plaintiff's (respondent's) application for summary judgment against the defendant (appellant) in the sum of RM118,800 with interest thereon at the rate of 8%pa from 14 September 2001 until full payment. The plaintiff's claim is on a policy of insurance against loss, damage or liability issued to the plaintiff by the defendant. The property insured was a motor vehicle, a Volvo 850 bearing registration NoQKH 7362 ('the said vehicle'). For convenience I shall, in this appeal, continue to refer to the appellant as the defendant and to the respondent as the plaintiff.

[2] The facts giving rise to the plaintiffs claim are these.

[3] On or about 16 November 2000, the defendant issued a Motor Insurance Policy No 00VSM002937 ('the said policy') to insure the said vehicle against loss, damage or liability including theft for the period 17September 2000 to 16 September 2001. In fact, the said vehicle was first insured with the defendant in 1997 when it issued a policy No 97KU005227 to the plaintiff for the period 15 May 1997 to 14 May 1998 ('the first policy'). The first policy was subsequently extended twice by the defendant until 16 September 2000 on the basis of proposals by the plaintiff for the same. So the said policy was in fact the third renewal of the first policy.

[4] As the said policy was soon to expire, the plaintiff took steps to extend it for a fourth period. This led to the defendant issuing a Cover Note No SMC0012893 on 13 September 2001 for the period 17 September 2001 to 16 May 2002.

[5] However, on 14 September 2001, ie three days before the said policy was to expire, the plaintiff discovered the theft of the said vehicle. So the loss occurred while the said policy was still in effect.

[6] When the plaintiff first proposed to insure the said vehicle with the defendant, the sum for which it was to be insured was stated in the proposal form as follows: 'Sum Insured (market value) RM120,000'. In each of the cover notes which were issued prior to the renewal of the policy on the next four occasions, the schedule states 'sum insured (market value) RM120,000'. The cover notes also contained an express provision that 'the risk is HELD COVERED in the terms of the company's usual form of policy applicable thereto'. The said policy itself contains a schedule in which the sum insured is again stated as 'Sum Insured (market value) RM120,000'.

[7] The relevant terms and conditions of the said policy with which this appeal is concerned are found in Section A thereof and they set out the basis

on which the defendant will settle any claims arising under the policy. On the happening of a loss covered by the said policy (of which theft is one), cl2 of Section A states:

2 Basis of Settlement

(a) We will at our option

(i) pay the cost of repairs to your vehicle, or

(ii) pay in cash the amount of the loss or damage to your vehicle, or

(iii) reinstate or replace your vehicle.

(b) The maximum amount we will pay is the market value of your vehicle at the time of the loss or the sum insured in the Policy whichever is the lower figure.

(c) If your vehicle shall at the time of happening of any loss or damage (be it partial/total) be insured for a sum less than its market value then, you shall be considered as being your own insurer for the difference and shall bear the rateable proportion of the loss accordingly. Provided always that this shall not apply unless the market value at the time of the loss exceeds the insured value by 10%.

(d) The market value of your vehicle would be determined in the event of a dispute by the Head Office of the Franchise-holder and this value would be equal to the cost of purchasing a replacement vehicle of the same make, model and age of your vehicle at the time of loss.

(e) In the event no Franchise-holder is available for the make of your vehicle the market value of the vehicle would be determined by a Loss Adjuster Licensed under the Insurance Act, 1963 and its subsequent legislation agreed to by both you and us.

(f) The valuation done by the relevant Head Office of the Franchise-holder or Loss Adjuster Licensed under the Insurance Act 1963 and its subsequent legislation will be conclusive evidence in respect of the market value of the insured vehicle in any legal proceedings against the insured.

[8] After the theft of the said vehicle, the plaintiff entered into correspondence with the defendant, requesting to be paid the sum of RM120,000 as the amount stated in the said policy as the sum insured but the defendant offered a lesser sum, initially offering RM88,800 and then increasing the offer to RM93,000. After rejecting both offers, the plaintiff commenced this action and then applied for summary judgment before a defence could be filed by the defendant. The learned sessions court judge allowed the plaintiffs application for summary judgment in the sum of RM118,800 after deducting RM1,200 for excess under the policy. Hence, this appeal.

[9] In the sessions court and now before me as well, the defendant did not deny or dispute liability under the policy. What the defendant does and did dispute is the amount payable to the plaintiff under the said policy. It is the defendant's contention that the said policy is an unvalued policy and that the sum of RM120,000 which was stated in the relevant cover note and said policy as the 'Sum Insured (market value)' is only the estimated value of the said vehicle and not its market value. According to the defendant, even though an amount is specified in the policy as the sum insured, on a

true construction of the terms of the said policy, the plaintiff is only entitled to be paid the market value of the said vehicle at the time of loss.

[10] The defendant further contended that what the market value of the said vehicle was at the time of its loss is a question of fact which is seriously in dispute and which has given rise to a triable issue because whilst the defendant has produced evidence regarding what that value was, no evidence has been led by the plaintiff in support of her claim. According to the defendant, the only evidence regarding the market value of the said vehicle at the material time came from two documents produced by it, namely: (a) a report by Mclaren Saksama (Malaysia) Sdn Bhd, a licensed adjuster, who stated the adjusted loss for theft at the material time in respect of the said vehicle was RM94,000; and (b) a letter from Federal Auto Cars Sdn Bhd, the Franchise-holder of Volvo cars who assessed the market value of a vehicle of the same make, model and age as the said vehicle at around the time of loss to be in the range of RM90,000. The defendant says that if that evidence of market value was rejected by the learned sessions court judge as it must have been, as is evident from her entering summary judgment against the defendant for RM118,000, then there was no evidence upon which the learned sessions court judge could come to a decision that the market value of the said vehicle was RM120,000. It is the defendant's case that the plaintiff could only have succeeded in obtaining summary judgment by proving that the market value of the said vehicle was equal to the sum insured at the time of loss, which she failed to do and so this was not a case in which summary judgment could have been entered.

[11] The plaintiff contends, on the other hand, that once the defendant had accepted the plaintiff's proposal to insure the said vehicle for RM120,000 and in having stated in the cover note and policy that the 'Sum Insured (market value)' was RM120,000, she became entitled, contractually, to be paid the full insured sum of RM120,000 (less RM1,200 for excess) which the defendant had accepted as the value of the said car.

[12] The plaintiff further contended that as the defendant had stated in the cover note which it issued on 13 September 2001 (in respect of the fourth renewal of the policy) that the 'Sum Insured (market value)' was RM120,000 and the said vehicle was stolen the next day, that was the conclusive value of the said vehicle at the time of loss.

[13] The plaintiff also took the point that having been stolen, the said vehicle was not physically available for valuation purposes and therefore it would be futile to attempt to estimate the market value of the said vehicle in accordance with cl 2(d) and (e) of Section A of the said policy. For this reason also, it was said that the evidence of market value that was offered in the two documents or reports that were produced by the defendant should be rejected, and the plaintiff entitled to have any ambiguity that may have arisen between the cover note and said policy resolved in favour of the plaintiff by applying the contra proferentum rule. In support of this proposition the plaintiff relied on the case of *Supreme QBE Insurance Berhad v Foo Yin Toh* [1987] CLJ (Rep) 993.

[14] In my judgment, this appeal will turn on whether the said policy was a valued or an unvalued policy. Before considering this question, it is appropriate that I say something about the law on the matter at hand.

[15] In Ivamy's *General Principles of Insurance Law* (3rd Ed) at p 231, it is stated that:

> All policies of insurance, whatever the kind of insurance to which they relate, may be classified in two ways:
>
> 1 According to the manner in which the subject matter is described.
>
> 2 According to the amount recoverable in the event of loss.

[16] We are here concerned with the second category of insurance policies described by Ivamy and as far as this classification is concerned, Ivamy goes on to state and I quote:

> 2 According to the amount recoverable
>
> Two types of policy fall within this class:
>
> (a) 'Unvalued' policies'.
>
> (b) 'Valued' policies.
>
> (a) 'Unvalued' policies
>
> In the case of an 'unvalued' policy the sum to be paid to the assured is not fixed by the policy, but left to be ascertained after the loss has happened, eg in the case of policies of insurance against liability and most policies of insurance on property.
>
> The sum specified in the policy as the amount of insurance, if any, merely indicates the amount beyond which the liability of insurers does not extend …
>
> (b) 'Valued' policies
>
> In the case of a 'valued' policy the amount recoverable is fixed by the policy, eg personal accident policies and certain policies of insurance on property.
>
> All personal accident policies belong to this class, and, as the value of life or limb cannot be accurately measured, the sum fixed in the policy is not open to objection on the ground of over-valuation.
>
> In the case of an insurance on property, the value of the subject-matter may be fixed by agreement and inserted in the policy as the amount recoverable in the event of loss.
>
> This valuation is binding, except in the case of fraud or mistake, and dispenses the assured from the necessity of proving the value of his interest, though he must still prove that he has an interest in the subject-matter of insurance.

[17] With the above definition of a valued and unvalued policy in mind, Inow turn to consider what type the said policy was. Although the plaintiff has not gone so far as to say that the said policy is a valued policy, to me the stand that she has taken amounts to saying the same thing because when she submitted that she became entitled, contractually, to be paid the full insured sum of RM120,000 (less RM1,200 excess) which the defendant had accepted as the value of the said vehicle (which was proposed by her) and specified that amount in the cover note and policy as the 'sum insured (market value)',

what she is saying is that the value of the said vehicle had been fixed by agreement and inserted in the said policy as the amount recoverable in the event of loss.

[18] In my judgment whether the said policy was a valued or unvalued policy is essentially a question of construction of the relevant terms found in the said policy which is best undertaken in the context of the following question: By specifying in the said policy that RM120,000 was the 'sum insured (market value)', had the value of the said vehicle become fixed by agreement and inserted in the said policy as the amount recoverable in the event of loss? If so, then the said policy is a valued policy and the plaintiff will be entitled to be paid that sum on proof of the loss.

[19] For the reasons that follow, I do not think that it was.

[20] In my view, the fact that an amount has been specified as the sum insured with the words 'market value' in brackets in the relevant cover note and said policy does not, without more, establish that the said policy is a valued policy because the cover note incorporates the terms and conditions of the defendant's usual form of policy and so both documents must be read together. When that is done it will be seen that nowhere in the said policy did the defendant agree with the plaintiff that in the event of loss, she would be paid the amount which had been specified in the policy as the sum insured. Instead, what the defendant had agreed to was that the maximum amount it would be liable to pay the plaintiff for any such loss 'is the market value of your vehicle at the time of the loss or the sum insured in the policy whichever is the lower figure'. (cl 2[b]). The other provisions of cl 2 then go on to set out how market value is to be assessed or arrived at. So a reading of the said policy as a whole will show that the sum to be paid to the plaintiff is not fixed by the policy but left to be ascertained after the loss has happened. It is reasonable to conclude that the said policy was an unvalued policy and that the sum of RM120,000 stated in the cover note and policy was the maximum sum recoverable in accordance with the terms of the said policy but only if it was less than the market value of the said vehicle at the time of loss. In arriving at my above conclusion, I have adopted the approach taken by Ajaib Singh J in *Chop Eng Thye Co v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 161 at p 164.

[21] What I have stated above also accords with what the learned author in *The Law of Insurance* by Raoul Colinvaux (4th Ed) had to say about the term 'sum insured' found in a policy of insurance. This is what the learned author said at p 10:

> *Sum insured* The agreement by the insurers to indemnify the assured is rarely an unqualified one; nearly always their liability is limited to a named amount known as the 'sum insured'. Where the value of the thing lost exceeds this sum, this sum is all that they are bound to pay; where the value of the thing lost is less, they are bound, except in the 1case of a valued policy, to pay no more than its actual value. There the principle of indemnity comes into operation to limit their liability to the loss actually suffered by the assured, for their undertaking is to pay that loss only.

[22] It is for the above reasons that I agree with the submission of counsel for the defendant that the fact that RM120,000 was specified in the policy as the sum insured together with the words 'market value' appearing within brackets did not mean that the defendant had agreed that that was the market value of the said vehicle because the defendant was perfectly entitled to accept the plaintiff's valuation of the said vehicle for the purpose of fixing the sum insured and the rate of premium payable and yet remain liable for the actual loss only by including terms and conditions in the policy to that effect.

[23] With regard to the plaintiff's contention that because the said vehicle was stolen one day after the defendant had issued the cover note of 13September 2001 in which the 'Sum Insured (market value)' was stated as being RM120,000 and so that estimate must be taken as conclusive value of the said vehicle at the time of loss, I regret I do not agree with this contention for the simple reason that the cover note incorporates the terms and conditions of the defendant's usual form of policy and I have already expressed my views on what these terms say.

[24] With regard to the plaintiff's arguments based on the contra proferentum rule, I regret that I do not agree with them because whilst it might be said that the absence of the said vehicle will make it more difficult to assess its market value at the date of its loss, this does not mean that an ambiguity has arisen in the said policy. The difficulty in valuation has arisen as a result of the non-availability of the said vehicle and not because of any ambiguity in the terms and conditions found in the said policy. Notwithstanding the absence of the said vehicle, the said policy does set out how market value is to be assessed and so it will be up to the assessing court to decide, after evaluating the evidence on market value that is presented to it by the parties, what that value is.

[25] With reference to the case of *Supreme QBE Insurance Berhad v Foo Yin Toh* which is relied on heavily by the plaintiff, I do not think that case is of any assistance to the plaintiff here because it is clear to me that in that case Mustapha Hussain J applied the contra proferentum rule against the insurance company there for good reason. The learned judge did so because the policy of insurance in that case specified that the payment of indemnity will be based on the 'market value' of the vehicle at the time of loss, but there was no indication in the policy of how the 'market value' was to be assessed, and so the learned judge, applying the contra proferentum rule, held that the insured there was entitled to be paid the amount specified in the policy as the sum insured. But as I have already pointed out, in our case there are express provisions in the said policy dealing with how the market value is to be assessed and so in my view the contra proferentum rule has no application to the facts of our case.

[26] For all the reasons given above, this was not a suitable case for the grant of summary judgment. The issue of the market value of the said vehicle at the time of loss was very much a triable issue. I accordingly allow this appeal with costs, set aside the judgment entered against the defendant and

give leave to the defendant to defend the action on the issue of market value of the said vehicle at the time of its loss.

Appeal allowed with costs. Summary judgment against defendant set aside. Defendant given leave to defend action on the issue of the vehicle's market value at the time of its loss.

Reported by Andrew Christopher Simon